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FOREIGN EVIDENCE RULES AMENDMENT

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HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 5406

FOREIGN EVIDENCE RULES AMENDMENT

APRIL 25, 1984

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FOREIGN EVIDENCE RULES AMENDMENT

WEDNESDAY, APRIL 25, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Gekas, and McCollum.

Staff present: Gail E. Bowman, assistant counsel; Raymond V. Smietanka, associate counsel.

Mr. CONYERS. The subcommittee will come to order.

The Criminal Justice Subcommittee meets this morning to receive testimony on H.R. 5406, the Foreign Evidence Amendments Act of 1984. We will also be working from a committee print of additional provisions which augment those contained in H.R. 5406.

The purpose of the legislation is to aid the U.S. Government officials in their efforts to gather evidence against and prosecute Americans who are engaged in illegal activities or accused of it outside of the United States.

These activities range from the laundering of funds obtained through the illegal sale of controlled substances to fraudulent securities schemes. They are particularly difficult to prosecute because our laws do little to facilitate prosecutors in their efforts to enter evidence held abroad into the United States court proceedings.

Our inability to bring these illegal activities to an end is resulting in a tremendous drain on the economy and an incalculable cost in lost tax revenues.

We have witnesses who will throw light on this problem and describe in detail some of the approaches. We are going out of order because of the demands on a university course, and so we are going to ask Prof. Paul Rothstein, an evidence professor at Georgetown University Law Center, to join us at the witness table. He is an expert on evidence and particularly the Federal Rules of Evidence.

He has been a consultant on criminal law and procedure to the Judiciary Committee and a consultant on evidence to the U.S. Department of the Treasury.

Professor Rothstein, please join us. Feel free to give us the benefit of your comments.

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TESTIMONY OF PAUL F. ROTHSTEIN, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Mr. ROTHSTEIN. Thank you very much, Mr. Chairman, and thank you for those kind words.

I wanted to express my appreciation to the subcommittee for asking me here today and to also compliment the subcommittee, in particular its chairman, and also the Judiciary Committee and its chairman for looking into this very important matter and seeing the importance of legislation such as this.

In general, I would like to preface my comments by stating that I very much am in favor of this legislation. It addresses a very important problem and fulfills a very important need and I regard it as essentially noncontroversial.

It is one of those few areas where the interests of law enforcement can be served without at all raising any allegation in any quarter, it seems to me, that anyone's rights are being tread upon except, of course, allegations by people who may be, in fact, guilty of wrongs or crimes who are brought to justice by this evidence.

I say this from the standpoint of one who is very much concerned about these matters and the rights of criminal defendants and civil parties as well as society's interest in prosecuting guilty offenders. I speak from the background of one who has actually worked in this area involving tax or tax offenders who are attempting to evade tax liability by using foreign bank accounts in Switzerland and other countries, where the laws and the banking institutions do tend to make it very difficult to get evidence for the prosecution or for civil tax proceedings.

I worked in this area, I believe it was in the period of sometime around the late 60's and early 70's, as a consultant to the United States Treasury and, in fact, at that time drafted a statute very much like this one, a proposed model statute for the Treasury.

I do have a few drafting suggestions for changes. I am working from the version of this bill that appeared on page S445 of the Congressional Record of January 31, 1984, the daily edition. The version I have is entitled, "Foreign Records Admissibility." I do have some suggestions for changes in the drafting of that bill.

Two of these suggestions I have previously transmitted to the staff and I do understand, although I have not yet seen it, that an attempt has been made to incorporate these into a new version.

A third suggestion I have has not been transmitted to the staff previously, and I will make it for the first time here today.

With the chairman's permission, I would like to submit something after today in writing for the record as well, if I might.

Mr. CONYERS. That would be indeed welcome.

Mr. ROTHSTEIN. Perhaps the need for this legislation could be best illustrated by referring to the general evidence law in this country and what it would provide concerning these foreign records if this legislation is not enacted.

Traditional evidence law requires, where a business record is to be introduced as evidence, that someone from the business come to testify to support the document, to authenticate it. Let's call him a sponsoring witness. So what I am saying is that normally under normal evidence principles a custodian or records person or official

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of the business must come to lay the foundation for the business record.

In cases where the business record comes from a foreign institution, like a foreign bank, which is the usual case, there can be some difficulty in getting someone to come to sponsor the document from the foreign bank.

Many countries, and Switzerland comes to mind, have a banking practice of enforcing rather strict secrecy, and the laws of those countries are sometimes favorable to the banks; and the combination of the laws and the banking practices is that you are unable to get someone from the business, from the bank, to come and sponsor the document, although they might be perfectly cooperative by giving our investigators the document over there in the foreign offices of the company.

It may also be impossible to take their depositions or otherwise subpoena them. The foreign laws might be inhospitable to that.

While in recent years some progress has been made in getting cooperation, agreements to cooperate from foreign countries, the picture is not yet complete and there still is tremendous difficulty, so that the problem is physically getting a sponsoring witness for one of those documents, an official of the foreign bank or foreign company.

The bill before us today alleviates this problem by dispensing with the necessity for a sponsoring witness, and I see that as a very laudable objective and something that we do want to do.

The way that this legislation does away with the need for a sponsoring witness is that it says that the functions of a sponsoring witness can be performed by attaching a certificate to the business record, a certificate made out by some official of the foreign company that the business record comes from. And my understanding of this matter is that frequently the foreign businesses would be willing to cooperate to this extent.

I see the present bill as being entirely in accord with the spirit of American evidence rules, and I also see it as having sufficient safeguards of the rights of individuals that might be harmed by this.

First, let me address why I think it is within the spirit of current American evidence rules.

In many situations under the Federal Rules of Evidence some preliminary fact must be proved before a piece of evidence is admissible. In other words, there is a series of rules of evidence in the Federal Rules of Evidence and each one says such and such fact is critical to the admission of certain evidence. The fact is a pre-condition for the admission of the evidence.

Questions arise frequently at trial as to how we prove the requisite pre-condition or fact. For example, let me just give a very simple example: the question whether or not a particular document (say a letter) is privileged by the husband and wife privilege. Before the privilege is applicable you have to prove these two were married, and there may be a factual dispute.

Traditional evidence law says that in proving the fact these two were married, or any preliminary fact that is required for admissibility of evidence, the judge can hold a little hearing in which he hears any kind of evidence you care to produce to prove the fact the evidence does not have to necessarily comply with the rules of

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evidence, it can be hearsay, it can violate the rules of evidence, it can be documents that would otherwise be hearsay, the idea being that this is a kind of a side inquiry a preliminary inquiry—an inquiry that determines the admissibility of a piece of evidence but it is not the main inquiry in the case, which is guilt or innocence or civil liability.

So the rules of evidence are relaxed in what I call the little mini-hearing where the judge decides whether the pre-condition to admissibility of this particular document is met or not.

If that is so, then if we look at the problem before us today, we see there is a preliminary question of fact to be determined. A business record is being offered from a foreign bank and the question is, is it really a business record. It is only admissible if it really is a business record, because the hearsay rule says evidence written out of court is hearsay because the writer of that document is not here to be cross-examined, is not here to be confronted.

But if it is a business record, compiled in the regular course of business, there is reason to believe in its trustworthiness: There is a business duty, and regularity attending it; and profits rise and fall on its accuracy. People would be fired if it is inaccurate.

But the question to be determined is, is it really a business record of that institution. That is a preliminary question of fact.

It seems to me that the way we normally handle preliminary questions of fact is we let the judge hear any kind of evidence he wants, whether it complies with the rules of evidence or not, in deciding whether this really is a business record.

And so I see no problem with saying, that one of the things he can consider is a certificate, even though certificates themselves are hearsay. They are written by somebody out of court who never comes forward to be cross-examined. They violate the normal rules of evidence, but nevertheless we said the normal rules of evidence do not apply to determining something like "Is this a business record?"

So I think it is within the spirit of American rules of evidence, but unfortunately American rules of evidence have gotten sidetracked, and they have said that on this one particular preliminary question of fact we must have a witness, a live, warm witness from the foreign business. And I say that is normally an unreasonable requirement. I would personally say a certificate should do the trick, and that is what this legislation proposes to do.

This is in accord with the general spirit of rule 104 of the Federal Rules of Evidence, which says on preliminary questions of fact the judge can receive almost anything that he wants to that has some degree of reliability.

Now, what about safeguards of the rights of the innocent? The main problem with introducing business records or indeed any statement that was written or made out of court and, therefore, hearsay, is that the person who avers the facts and wrote them down in the record or made this statement out of court is not here to be confronted, to be cross-examined. You are introducing the business record against somebody and the writer of the business record is not here to be cross-examined.

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But the hearsay rule and the constitutional confrontation clause say that is all right if there is reason to believe in the accuracy of that out of court statement, some special guarantee of accuracy.

No. 1, the legislation before us is letting in a business record. That has always been regarded as a special guarantee of accuracy, because of the regularity, the business duty, the fact that people will be fired if they are not accurate, and the fact that the business' profits ride on it.

No. 2, the legislation here adds an additional safeguard that isn't even really needed but is advisable, and that is that, under this legislation, the person who would oppose the business record is furnished, in advance of trial, with the name and address of the custodian or writer (or equivalent) of that business record. So that if the opponent of the document feels he wants to cross-examine or contact that person or that there is something wrong with this business record, he is not deprived of his right to do so. He can go depose that person or subpoena him; or at least talk to him if it happens to be a country where compulsory process is unavailable. The bill does shift the risk ensuing from such unavailability.

So that this statute adds a safeguard that may not be necessary under normal law but I think is desirable, and that is it provides the person against whom the record will be used with advance notice of sufficient information so that he can go and get the person who wrote or knows about the record, cross-examine him, or at least ask him questions if he will cooperate, so it is not a case of just using the business record without at least some opportunity to talk to the writer of the business record or similarly knowledgable person.

And yet, traditional evidence law in the case of domestic business records, American business records allows the business record to be used even without this notice, even without any opportunity to cross-examine the writer of the business record.

So I see this statute as having sufficient safeguards to protect even the most finiky of persons in this respect. So, basically, what I have said is I approve very much of this legislation. I think it safeguards all interests.

I do have three technical problems with the drafting, however, and these three are really clarifications of the drafting. The drafting is actually on the whole very good, in my view. It is just that I would call for three clarifications.

No. 1, I will call this the double hearsay problem. It deals with this situation: Frequently information in a business record comes to the business from someone outside the business. For example, a customer or some other organization supplies the business with the information that the business puts in the business record. Now, this situation has many manifestations.

Let me give you one example. Let's take a bank record. A bank record might recite that the person behind a particular corporate depositor is Mr. X, and they may have found this out from someone in the outside world, in the corporation that is making the deposit in the bank, or the bank record might recite that so and so, Mr. X, is the real party in interest behind this account, and they might have got that information from some company outside, maybe the depositor itself. Or the depositor himself comes to the bank counter

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and says, "I am Mr. X; I am making a deposit; this is my account." Yet you don't know if he really is Mr. X.

Or he will say the real party behind these funds is X corporation. The bank writes that down but you have no way of really verifying the accuracy of this person outside the business or this company outside the business that is reporting to the bank. There are no guarantees of accuracy surrounding that person, that outsider. Sure, the bank's process of writing it down is guaranteed because it is a business record and regular business duty attends the person who wrote it down, so he is probably reliable and the profits of the bank ride on it. But the person outside the business perhaps has no similar business duty to be accurate and indeed might be trying to frame someone, or just is careless or inaccurate.

So my position is (and there is a split in American evidence law on this about domestic business records), my position is that a business record that records something that the business got from outside the business ought not to come in, at least that portion ought not to come into evidence unless there is some additional hearsay exception or some additional guarantee covering the accuracy of that outside person, that person outside the business.

That is the prevailing view under American evidence law, but there is a split of authority about it. But the cases that have considered it in a reasoned way have come to this same conclusion.

The present bill is totally ambiguous as to this question, as to whether such a business record with information from outside the business comes in or stays out, and so I think that could be clarified.

The second drafting problem I see I will call the authenticity of the certificate problem, the problem of the authenticity of the certificate itself that is attached to the business record. The bill that I am working from, the bill that I am looking at, provides that a certificate meeting certain requirements can establish that the underlying business document to which it is attached is indeed an authentic business record.

But how does a litigant establish the authenticity of the certificate, for example, how does one establish that the certificate itself meets the conditions that the bill says it must meet? For example, the conditions are laid out in the statute that the certificate must be signed by a particular person and that he must hold a particular position, he must be an officer in the business.

Let's say that a certificate is signed by someone and it says, I have this position in this business. How do we authenticate that? How do we prove that? How do we establish that?

Another thing that the certificate must have in order to comply with this statute is that the person signing it must be subject to the penalties for perjury under the foreign law, which can be a complicated matter under foreign law. How do we prove that he was subject to the penalty of perjury when he signed it?

Is it enough that the certificate itself recites all of these things?

Well, in my view, it should be enough (as a prima facie matter to raise a presumption) that the certificate recites just on its face that it complies with all of these things, that I am Mr. So and So and that I have such and such position in the business and that I signed this subject to the penalties for perjury.

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That should be enough to raise a prima facie presumption, a rebuttal presumption that the certificate complies with all of these requirements. But it should be open to proof on the part of the other side if they can prove it, if they have concrete, positive proof that these things are not so.

The bill that I have before me is not clear at all about this. It does not address this matter at all. It does not say recitations in the certificate are or are not any evidence, it does not say anything at all whether these recitations in the certificate are or are not any evidence at all. So this is the authentication of the certificate problem as distinguished from the authentication of the business record, which I think is taken care of by the certificate. But then you have to authenticate the certificate.

The third problem that I see is a problem that has come up in a number of Federal cases, and it is the problem of explaining what the business record means. Many of these business records, say bank account statements, are not self-explanatory. It takes some explanation as to what this column means and what that column means and what this crossways column means and what these numbers mean, and this is even more so in the case of some foreign bank records that might be kept differently from our own.

It is generally not enough that some investigator who went and got the bank record, brings it to the court and says, "I am an experienced investigator and this is what all of this means." The court is likely to say, "You don't have any first-hand knowledge of that. You are not from the business."

So in the situation contemplated by this statute that problem is going to arise, because this statute says the certificate can prove that this is a business record. But it does not say that the certificate can explain the entries on the business record. And so you are still going to need someone from the foreign business to come and explain the entries on the business record.

But we may not be able to get someone from the foreign business to do that or it may be more trouble or expense than it is worth. That is why we are enacting this statute.

There are some American cases that say a certificate cannot do this explaining job. That is testimony. How does it come up in American cases? There is a provision of the Federal Rules of Evidence that says that in the case of domestic businesses a certification from a manager of the business that he searched the business records, and there is no such record attesting to the existence there of Mr. Jones or attesting to the sale of widgets on January 4, no such record. His certification that he searched the business records and it is not there is accepted as proof that no such sale was made or no such person exists.

So you have certificates in American law today and they have said that these certificates can do no more than just certify the absence of the record. But they cannot explain anything further, cannot explain the recordkeeping process of the business or whether it would be there, and things like that.

So you are going to run into that problem under this statute. A business record is going to come in that needs explaining but the certificate will be held not to be able to perform that function. It can't explain. All it can do is say this is a business record.

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So I think the statute should pay some attention to that problem. You may feel it is inadvisable to allow a certificate to carry this bigger burden of explaining what is in the record, because, after all, the writer of the certificate is not here to be cross-examined.

On the other hand, you might feel that if the opponent of this record is notified who the writer of the certificate is, maybe it is all right to let the certificate explain the record and the opponent can go question him if he has any further questions before trial or try to take his deposition or at least interview him or try to subpoena him perhaps.

So those are my three kinds of technical amendments to the bill, at least the bill I have been working with. Some may have been taken care of in the latest print which I have not looked at.

But, basically, let me reiterate that I am very much in sympathy with the spirit of this statute and I think that in general it is drafted quite well.

Thank you very much.

Are there any questions for me?

Mr. CONYERS. We want to express our appreciation for the discussion because you have been extremely helpful and we appreciate it, not only here at the hearing but in preparing for the legislation.

Mr. ROTHSTEIN. Thank you.

Mr. CONYERS. I think, Professor Rothstein, that in trials in which foreign documents may become an evidentiary problem that frequently the trial can get hamstrung by the difficulty of getting records under the present requirements which follow the American law situation.

In other words, what I am asking you is, is this something that defense attorneys probably look to in the course of a trial to increase the difficulty of the entry of proof?

Mr. ROTHSTEIN. My experience is yes, and you cannot really fault defense attorneys for doing that, because their duty is to do everything they can within the law for their client and, in fact, they would be unethical if they didn't.

But the fact is that in a case involving a foreign bank, funds in a foreign bank, it is almost impossible to, under current American evidence rules, to get in foreign bank records unless someone from the bank is willing to come or is compellable under their own law to come and lay the foundation, and they frequently don't.

Mr. CONYERS. Do you recall any matters out of your own experience in which extreme frustrations occurred in trials of this kind?

Mr. ROTHSTEIN. I might say that actually I have been on both sides of this matter. I have from time to time invoked American evidence law on behalf of a client to keep out documents. But also for a couple of years I was consultant to the U.S. Treasury on the *Ray Ryan* case in which apparently the Ryans invoked the principles of American Evidence Law to shield Swiss bank accounts and the American authorities asserted that these Swiss bank accounts were being used for tax evasion, and it took years and years and years.

I believe I was in on it in 1974, 1975 and 1976. I just know now in 1984 that the *Ray Ryan* case has finally come up for adjudication in the Court of Appeals. So it has been many, many years, and the Court of Appeals notes that the Ryans have made it impossible to

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get the evidence and I think that is a prime example. The problem was the very problem that this statute is addressed to.

I understand it is only the tip of the iceberg, that foreign and offshore locations are used time and again to shield taxpayers from civil and criminal tax investigations.

Mr. CONYERS. I would think that in the Bahamas and Antilles, places like this, maybe places where we don't even have our treaties up to date, that getting evidence like this becomes one of a number of problems. You have to get to a trial to get to this problem.

Mr. ROTHSTEIN. Yes.

Mr. CONYERS. In some instances if it's formidable enough you never get to document admissibility.

Mr. ROTHSTEIN. That is right. The case may have to be abandoned because you know that these foreign bank records, you are not going to be able to introduce them. So this would also facilitate settlements I think for people to know that well, you know, the truth is now going to come into evidence so we better pay up.

Mr. CONYERS. Right.

I would like to thank you again and recognize the ranking minority member, Mr. Gekas.

Mr. GEKAS. Thank you. I join in the chairman's appreciation of your testimony. I think you hit on all of the inquiries that popped up into my conscience when I first reviewed the contents of this bill.

I must ask you, you implied that the present status of the law prohibits a full implementation of business records entries because the government of a foreign country has certain types of laws that protect the secrecy of documents and protect the exporting of individuals, so to speak, to testify in foreign courts like in America.

Why aren't those fears on your part also visited upon even the records that would be sent to the Untied States under the new legislation? In other words, if the laws of the foreign country prohibit a bank official from disclosing X, Y and Z under the present law, why if we adopted this legislation would that change their ability to certify?

Mr. ROTHSTEIN. What the foreign laws do is they protect say a bank manager who doesn't want to testify in the United States or give a deposition. In other words, they tell him it's his right to refuse to do that, and they say the foreign law says we will not order a deposition. We do not have a deposition procedure, for example. Or we do not recognize the right of a foreign court to order a deposition of our people in our territory.

In other words, it is not necessarily a foreign law addressed specifically to preserving bank secrecy, although that might be what it is. It is a general law saying our citizens don't have to do anything they don't want to do for a foreign power.

So this statute gets around that because most of the time you can get the bank manager to cooperate to the extent he voluntarily will give you the document and maybe even explain it to you a little bit, but he won't go and testify and the foreign law says he can't be compelled.

Now some foreign jurisdictions will compel him. If our court writes to their court and says compel this guy to either give a depo-

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sition or come to America, they will, or they may do that, but a lot of foreign countries don't.

So it's that situation where the foreign court won't compel cooperation. The foreign law doesn't mind the fellow giving you the document but they prevent us from compelling him to come as a supporting witness or give a deposition.

Mr. GEKAS. But there is nothing compelling him even to certify, you say.

Mr. ROTHSTEIN. There is nothing compelling him to certify but frequently you can get him to certify.

Some foreign law would go so far as recognizing a certificate procedure. They say that we will make him do it but we don't recognize depositions.

Mr. GEKAS. It's not quite clear to me. I am trying to envision it. I am thinking of the Swiss bank accounts.

Mr. ROTHSTEIN. If he doesn't want to do anything there is probably not much you can do, if the bank manager doesn't want to do anything. But in this investigation that I was part of, the bank was pretty cooperative within its own borders.

Mr. GEKAS. Isn't there a state of comity between Switzerland and the United States with respect to at least certifications?

Mr. ROTHSTEIN. I think we have been able to solicit the cooperation of the governments, in asking people to certify and indeed making people certify in certain foreign states, but many states resist going so far as compelling people to give depositions or to testify in foreign courts.

Mr. GEKAS. Accepting that that certification wouldn't find as many hurdles as depositions, et cetera?

Mr. ROTHSTEIN. Yes.

Mr. GEKAS. Then this bill is very good in facilitating our evidentiary processes.

Mr. ROTHSTEIN. Perhaps we should press in connection with this bill for more agreements with foreign governments.

Mr. GEKAS. Yes. I was saying we have to do more to ensure the efficacy of this legislation beyond what we state in this legislation.

Mr. ROTHSTEIN. Yes, I think that is a good point, that sometimes people will voluntarily give certificates; sometimes foreign nations will compel them. But we could do more work on that front to make at least certification more compulsory.

Mr. GEKAS. Yes. The second part, as you were testifying, I was considering was the authenticity of the certification which in itself can find problems like double hearsay. Who is going to authenticate the certification and who is the authenticator and what are his credentials and who is going to authenticate the authentication and et cetera, and it goes back in a mirror ad infinitum.

We have met that problem domestically many times by simply making sure that the certifier does so under oath; so that perjury processes go into effect. So we have a notarization, an oath of office type of thing that this individual has sworn that the certification is true according to whatever oath he has taken.

Mr. ROTHSTEIN. But how do you prove that he did take the oath and that the notary seal is genuine and it is a real notary?

Mr. GEKAS. That is my question. The certification we are talking about here could be, if we don't change it somehow, a simple state-

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ment by the officer without subjecting him to the perjury laws of his own jurisdiction by compelling him to take an oath in front of what we would consider to be a notary public.

Here in the United States in trials in which I have been involved the original certification that comes from a recordkeeper is authenticated by a notary from that jurisdiction and then we further require a certification of the notary's power to give that oath from the county courthouse wherein is lodged the authority of the notary public.

I am asking whether we should go that far in spelling out how this certification would be authenticated.

Mr. ROTHSTEIN. That is a possible route, but I think it is too cumbersome because then there would be a question how do we know that court was a real court, and had that authority?

Mr. GEKAS. How do we know that country exists?

Mr. ROTHSTEIN. That fact we might take judicial notice of. But you are not familiar with all of the courts.

What you could do, which I sometimes do, is there has to be a chain of certifications up to the American Consul; and him we will just accept as being the American Consul or a consular officer.

I think that is too cumbersome if I may be permitted to say so. I think a better solution would be to say that the certification, that is the first certification that accompanies the business record, is prima facie on its face accepted as authentic if it just recites these things are complied with, subject to proof by the other side that it is not authentic and does not comply, if they have positive proof.

Mr. GEKAS. I understand that. But you interjected the quotient of the perjury laws of that jurisdiction. What I am saying to you, I would prefer any kind of certification to bring into play the perjury laws of a jurisdiction.

We cannot do that, it seems to me, until we subject that certification to an oath.

Mr. ROTHSTEIN. Yes. I agree that it must be. That is right. He must do this certification under oath. But what I am saying is how do you prove that it really was under oath?

Mr. GEKAS. You accept that prima facie.

Mr. ROTHSTEIN. That is right. OK. We are in agreement then. That is correct.

Mr. GEKAS. Let's see if we are in agreement. Assuming that the oath giver's authentication is accepted prima facie, which eliminates all of these other problems of going back to the Consul and Rand-McNally, if we accept that as being prima facie evidence that authority exists in the oath giver, then the step forward to the certificator brings into play the perjury laws.

Are you agreeing with me in my feeling that without the oath thing that we cannot be guaranteed that the perjury laws of that jurisdiction come into play?

Mr. ROTHSTEIN. Even with the oath some laws may not attach perjury penalties to it.

Mr. GEKAS. I can't see how that is possible. Well, you are right, because perjury may be restricted to giving testimony only in a proceeding rather than through the routine oath for authentication. That might be so.

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But I would feel better and I think you are saying that it is probably salutary to at least have the oath taking type of authentication: aren't you really?

Mr. ROTHSTEIN. Yes, I am. You have added a wrinkle to what I have said. I said that one certification, if given under circumstances of an oath, is enough, and all he has got to do is recite that I gave this under circumstances of an oath; but you are suggesting in addition the stamp of the oath giver and that it ought to be accepted at least prima facie as authentic until there is proof to the contrary.

I would accept that. I think that is a good idea.

Mr. GEKAS. I would ask staff to take note of that and see if we can build it into whatever amendments we make to the bill.

Mr. ROTHSTEIN. In other words, it is two certifications really and stopping there at two, then I think that is probably enough.

Mr. GEKAS. We prima facie one step further away from what we originally did.

Mr. ROTHSTEIN. I think that is a desirable amendment to what I suggested.

Mr. GEKAS. I have no further questions. Thank you, Mr. Chairman.

Mr. CONYERS. We are very happy to have had you as our lead-off witness and thank you for the very important contributions you have made in this discussion and in the work earlier.

Mr. ROTHSTEIN. Thank you, Mr. Chairman, for hearing me. I apologize to the committee and to the remainder of the witnesses that I do have a class at 11:10 and I have to get off to Georgetown. I would like to stay and hear the rest of it. Thank you.

Mr. CONYERS. We welcome again the Deputy Assistant Attorney General for the Criminal Division of the Justice Department, Mark Richard. It is within his department that the responsibility for the prosecuting of illegal activities that this evidence rule may frequently arise falls, and we are very pleased to see that you have been thinking about this and can bring to bear actual experience of the department.

We incorporate your prepared statement and invite you to proceed.

TESTIMONY OF MARK RICHARD, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY MICHAEL ABBELL, DEPUTY DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. RICHARD. Thank you, Mr. Chairman.

With your permission I would like to introduce a colleague, Michael Abbell, who is Deputy Director of our Office of International Affairs at the Criminal Division. That office handles all of our criminal efforts to secure evidence from abroad in an admissible form.

With your permission, Mr. Chairman, I suggest just briefly outlining my testimony and submitting the statement in full for the record, with your permission.

Mr. CONYERS. Quite all right.

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Mr. RICHARD. Mr. Chairman and members of the subcommittee, I appreciate this opportunity to present the views of the Department of Justice on H.R. 5406, a bill designed to facilitate the admission of the foreign records of a regularly conducted activity in evidence in the United States and on similar and related provisions proposed by Senator Roth and passed by the Senate as amendments to S. 1762, the Comprehensive Crime Control Act of 1984.

H.R. 5406 and the Roth amendments would create a new provision in the United States Code designed to allow the introduction of foreign business records in the criminal proceeding in the U.S. court without the need for foundation testimony by a custodian of the records or other qualified witness.

Currently, in order to meet the hearsay exception, it is necessary to obtain the testimony of a qualified witness to establish that the records were kept in the course of a regularly conducted business activity and other factors required under the exception.

In the case of foreign records, this requires taking a deposition of the custodian in a foreign country or seeking his testimony in the United States, an extremely costly and time-consuming matter.

H.R. 5406 and the Roth amendments recognize that the hearsay exception for records of a regularly conducted activity can be established equally well in most criminal cases involving foreign records through a signed certification by the custodian of the records or other qualified person setting forth that the records meet the criteria of the current rule.

The Department of Justice supports the general thrust of H.R. 5406 and the similar provision approved by the Senate in S. 1762. However, we do believe certain technical changes need to be made in both bills to permit them to better achieve their objective and that at least two of the related matters dealt with in the Roth amendments, exclusion from the Speedy Trial Act of periods of delay necessary to obtaining evidence from abroad and suspension of statutes of limitations, for up to 3 years to permit the Government to obtain investigative information and evidence from abroad should be included in any legislation in this area.

With the major advances in transportation, communications, and data processing technology in recent years there has been a concomitant increase in transnational criminal activity affecting the United States, particularly in the areas of narcotics trafficking and large scale fraud.

As then Assistant Attorney General D. Lowell Jensen stated last year in testimony before the Senate Permanent Subcommittee on Investigations:

> We are no longer dealing with one sovereign nation but with many. The activities of United States investigative agents and prosecutors involved in such cases are regulated not only by United States law but by the laws of the countries in which all or part of the criminal activity with which they are concerned took place. And the effect of United States court orders supporting our efforts to obtain investigative information and evidence is limited to a significant extent by the willingness and ability of affected foreign countries to permit the execution of those orders.

Two of the most serious problems faced by United States law enforcement authorities in investigating and prosecuting transnational criminal activity affecting this country are the time-consuming nature of efforts to obtain investigative information and evi-

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dence from abroad and the unnecessary expense and delay associated with getting business records, which are located in a foreign country, admitted into evidence in a criminal trial in the United States.

Even though there is seldom any doubt as to the trustworthiness and authenticity of such records, under present rules of evidence they only can be admitted over the objection of the defendant on the basis of the testimony of their custodian or of another qualified witness who the defendant had the opportunity to cross examine.

Although their testimony can be taken before a U.S. consul in the country in which the records are located pursuant to 18 U.S.C. 3491 et seq., in most instances the custodian or other qualified witness will not voluntarily submit to a deposition before a U.S. consul or will be precluded by the law of that country from testifying about such records except pursuant to an order from a court of that country.

Therefore the United States generally will be limited to requesting such testimony pursuant to a letter rogatory from a United States court to a court in the country in which the records are located or, with respect to countries with which we have mutual assistance treaties in criminal matters such as Switzerland, pursuant to a request under the treaty.

Plainly, the interests of justice require an easier way to obtain the admission in evidence of business records in a foreign country which are maintained in a manner in which there can be little question of their authenticity and trustworthiness.

While we strongly support the substance of both of these proposals, we think certain changes need to be made in both bills to enhance their ability to attain their mutually desired objective. These changes are:

Recast the proposal to conform more closely to rule 803(6) of the Federal Rules of Evidence. In our view the criteria and terminology governing the admissibility of foreign and domestic business records should track as closely as possible to prevent unnecessary litigation resulting from the use of different phraseology to express a requirement common to both. For example, rule 803(6)—defines the term "business." H.R. 5406 and the Roth amendments do not.

Second, require that the certification of the custodian or other qualified witness be subject to sanctions for untruthful statements rather than to penalties of perjury. Because some countries might not punish false certifications under their perjury laws but, rather, under their laws akin to our false statement laws, it is preferable to use this broader terminology.

Third, require that the proponent of the admission of foreign business records based on a certification, file a notice of intention to introduce such evidence at arraignment or as soon thereafter as practicable and that the court rule on the motion to admit such evidence before trial.

Additionally, we would propose that consideration be given to retaining sections 3491 through 3494 of the code. That provides a method of certifying and authenticating foreign documents which, while admittedly has seldom been used since the passage of rule 15 of the Federal Rules of Criminal Procedure, does permit the taking of depositions in criminal cases at the request of the Government.

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This provides an alternative method in which the custodian or other qualified witness is willing to voluntarily appear for deposition at a U.S. embassy or consulate, thereby relieving the United States of the need to proceed by ways of letters rogatory or a request under a mutual assistance treaty in criminal matters.

In addition to facilitating the admissibility of foreign business records in U.S. criminal proceedings it is highly desirable for any legislation designed to enhance the ability of U.S. law enforcement authorities to investigate and prosecute offenses with respect to which evidence must be obtained from abroad to remove at least two other obstacles to such investigations and prosecutions.

First, potential problems under the Speedy Trial Act should be eliminated by amending 18 U.S.C. 3161(h) to specifically exclude reasonable periods of delay resulting from efforts to obtain essential evidence from abroad for use at trial.

While such periods of delay are arguably already excludable under sections 3161(h) (3) and (8), it is desirable in our judgment to avoid unnecessary litigation with respect to the scope of those sections by specifically providing for the exclusion of such periods.

Second, potential statute of limitations problems relating to delays in obtaining investigative information and evidence from abroad should be alleviated by permitting the applicable statute of limitations to be extended on application of the Government for the time needed to obtain such information or evidence but in no event by more than 3 years.

In order to give this subcommittee a more concrete understanding of the problems faced by U.S. investigators and prosecutors in pursuing investigations and prosecutions in which major offenders use foreign bank accounts and shell corporations to cover their tracks, I am appending to my testimony a summary of the problems encountered by United States investigators and prosecutors in investigating and ultimately successfully prosecuting a multimillion dollar fraud and kickback scheme perpetrated against Raytheon Corp. by two of its former employees and two principals of a shipping company which had been retained to ship goods produced by Raytheon.

This summary dramatizes the importance to United States law enforcement authorities of legislation to better permit them to cope with the rapidly growing problem of transnational criminal activity affecting this country.

While the legislation suggested today cannot alone solve all of the problems we face in obtaining investigative information and evidence from foreign countries, it can greatly help. We stand ready to assist this subcommittee in any way we can in the drafting and passage of legislation which will permit this country to better deal with the increasing problem of transnational criminal activity.

That would conclude my summary and I will be glad at this time to answer any questions you may have.

Mr. CONYERS. Thank you very much. We accept your offer to continue to work with our committee and staff in finishing off this piece of legislation .

I would like to recognize Mr. Gekas.

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Mr. GEKAS. I just have one question. I, too, appreciate the time. This has to do with a side issue.

It seems, I get the implication from your testimony that letters rogatory are less attractive for the one who has to answer the questions than appearing at the Embassy to give a deposition. The way you phrased it, this is just for my own clarification of these particular methods, the way you phrased it it seemed that a person could go to the Embassy, a foreigner, to the American Embassy rather than submit to letters rogatory.

It seems to me that letters rogatory are the most businesslike, expeditious type of providing evidence for the one who has to answer the questions than scheduling a deposition.

Mr. RICHARD. On the contrary. We are dealing in an area with a variety of options; but very limited options. By and large, at least in my experience, letters rogatory, while available, are very tedious, time consuming and frequently a very prejudicial process to investigators and the government.

You must frequently set forth in minute detail the bases of your request, including a good portion of your evidence, translate it and transmit it to the foreign country, and seek on the basis of comity the cooperation of the foreign government in ordering the individual to submit to testimony or to a process whereby we can hopefully obtain the evidence.

Frequently that process leaves much to be desired for a variety of reasons dealing with the domestic law in the foreign country.

Where you have an individual who is amenable to submitting to testimony and is not confined by the laws of the foreign government from doing so—frequently the foreign government laws prohibit the individual, whether he wishes to or not, from providing this information, except pursuant to court order—where those laws are not applicable and he is amenable to submitting to testimony, but just does not want to come here, then we have been using one of two devices, a rule 15 motion to take a deposition abroad, or we have this alternative method set forth in 3491 of taking depositions under the auspices of the American Consul.

The problem is that right now we are dealing in a two-phase process. We have an investigation—we want access to certain bank records for investigative purposes. Under certain conditions that now unless there is a mutual assistance treaty, requires us to submit a request pursuant to letters rogatory which, as I indicated, is an extremely time consuming and costly process.

We get the records. We don't have outstanding charges yet. So once we receive the records, analyze them, develop the case, and return indictments, now we have to go back a second time and acquire the foundation information through a mechanism by which the defendant, under existing law at least, arguably has had an opportunity to be present.

So we are back a second time, if you will, with letters rogatory seeking now the foundation testimony for the admissibility of those records that we acquired 6 months previously. And this is again an extremely costly, time-consuming process.

The proposal, by eliminating the second step, has much to offer us in streamlining the process, in cutting down the cost, because more often than not, quite candidly, in our experience, many times

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where you can demonstrate to the defendant that we have the evidence, and we have it in an admissible form, there is no quarrel about the adequacy of the foundation testimony, there is no quarrel with the authenticity of the documents, if you will. More often than not when we indicate at time of trial that we have the materials and can produce them at trial, the records are stipulated to at least for foundation purposes.

So this is our perspective on the problem.

Mr. GEKAS. I thank you.

I have no further questions, Mr. Chairman.

Mr. CONYERS. We are grateful for you coming today and our thanks again.

Mr. RICHARD. Thank you, sir.

[The statement of Mr. Richard follows:]

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STATEMENT OF MARK M. RICHARD

DEPUTY ASSISTANT ATTORNEY GENERAL

CRIMINAL DIVISION

U.S. DEPARTMENT OF JUSTICE

CONCERNING H.R. 5406 AND S. 1762 ON

OBTAINING EVIDENCE FROM ABROAD IN CRIMINAL CASES

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

APRIL 25, 1984

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Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to present the views of the Department of Justice on H.R. 5406, a bill designed to facilitate the admission of the foreign records of a regularly conducted activity in evidence in the United States, and on similar and related provisions proposed by Senator Roth and passed by the Senate as amendments to S. 1762 -- the Comprehensive Crime Control Act of 1984. 1/

The Department of Justice supports the general thrust of H.R. 5406 and the similar provision approved by the Senate in S. 1762. 2/ However, we believe certain technical changes need to be made in both bills to permit them to better achieve their objective, and that at least two of the related matters dealt with in the Roth Amendments -- exclusion from the Speedy Trial Act of periods of delay necessary to obtaining evidence from abroad and suspension of statutes of limitations, for up to three years, to permit the government to obtain investigative information and evidence from abroad -- should be included in any legislation in this area reported out by this Subcommittee.

1/ Sections 1213 through 1218

2/ Section 1214

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With the major advances in transportation, communications, and data processing technology in recent years, there has been a concomitant increase in transnational criminal activity affecting the United States -- particularly in the areas of narcotics trafficking and large-scale fraud. Congress had the authority to confer adequate powers on the other branches of government to permit the United States to cope with the great increase in interstate criminal activity occurring during the past 125 years because all such activity occurs within the United States. However, its ability to provide federal law enforcement authorities and courts with sufficient means to deal with the rapidly growing level of transnational criminal activity is much more circumscribed. As then Assistant Attorney General D. Lowell Jensen stated last year in testimony before the Senate Permanent Subcommittee on Investigations:

> We are no longer dealing with one sovereign nation, but with many. The activities of United States investigative agents and prosecutors involved in such cases are regulated not only by United States law, but by the laws of the countries in which all or part of the criminal activity with which they are concerned took place. And, the effect of United States court orders supporting our efforts to obtain investigative information and evidence is limited to a significant extent by the willingness and ability of affected foreign countries to permit the execution of those orders.

Two of the most serious problems faced by United States law enforcement authorities in investigating and prosecuting transnational criminal activity affecting this country are the

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time-consuming nature of efforts to obtain investigative information and evidence from abroad and the unnecessary expense and delay associated with obtaining business records, which are located in a foreign country, admitted into evidence in a criminal trial in the United States.

For example, the United States is presently directing a significant part of its narcotics investigative effort at the laundering of the profits of major drug trafficking organizations. Tracing these profits through foreign banks is a painstaking and time-consuming task. It often takes years to follow such funds through numerous bank accounts and shell corporations and to tie them to major drug traffickers.

Even though there is seldom any doubt as to the trustworthiness and authenticity of such records, under present rules of evidence, they only can be admitted over the objection of the defendant on the basis of the testimony of their custodian or of another qualified witness who the defendant had the opportunity to crossexamine. Since such persons are generally not United States citizens or residents, the United States lacks any ability to compel their appearance at trial. 3/

3/ See 28 U.S.C. 1783

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Although their testimony can be taken before a United States Consul in the country in which the records are located pursuant to 18 U.S.C. 3491 et seq, in most instances the custodian or other qualified witness will not voluntarily submit to a deposition before a United States Consul or will be precluded by the law of that country from tesifying about such records except pursuant to an order from a court of that country. Therefore, the United States generally will be limited to requesting such testimony pursuant to a letter rogatory from a United States court to a court in the country in which the records are located or, with respect to countries with which we have mutual assistance treaties in criminal matters such as Switzerland, pursuant to a request under the treaty.

Plainly, the interests of justice require an easier way to obtain the admission in evidence of business records in a foreign country which are maintained in a manner in which there can be little question of their authenticity and trustworthiness. 4/

4/ The scheme established by these bills for the admissibility of foreign business records is similar in theory to the procedures established by the Federal Rules of Evidence for the admissibility of public documents. Because of the inherent trustworthiness of records of a regularly conducted activity, their admissibility into evidence should not as a rule require foundation testimony by foreign witnesses since the protection offered by the certification process will be adequate. It is this same high level of reliability for public documents that justifies their admission into evidence without testimony by the custodian of the records. Thus, we are confident that the procedures established by these bills will withstand Constitutional scrutiny under the Confrontation Clause of the Sixth Amendment. United States v. Leal, 509 F.2d 122 (9th Cir. 1975). See also Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970).

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While we strongly support the substance of both of these proposals, we think certain changes need to be in both bills to enhance their ability to attain their mutually desired objective. These changes are:

- Recast the proposal to conform more closely to Rule 803(6) of the Federal Rules of Evidence. In our view, the criteria and terminology governing the admissibility of foreign and domestic business records should track as closely as possible to prevent unnecessary litigation resulting from the use of different phraseology to express a requirement common to both. For example, Rule 803(6) defines the term "business." H.R. 5406 and the Roth Amendments do not. And, Rule 803(6) provides that the sole ground for a court to refuse the admission of relevant, properly authenticated business records is that the "source of information or the method or circumstances of preparation indicate lack of trustworthiness." Neither H.R. 5406 or the Roth Amendments are clear on this matter.

- Require that the certification of the custodian or other qualified witness be subject to sanctions for untruthful statements, rather than to penalties of perjury. Because some countries might not punish false certifications

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under their perjury laws, but rather under their laws akin to our false statement laws, it is preferable to use this broader terminology which encompasses the objective that the certification must be given in a manner that subjects the person giving it to criminal sanction if he does so falsely.

- Require that the proponent of the admission of foreign business records based on a certification file a notice of intention to introduce such evidence at arraignment or as soon thereafter as practicable, and that the court rule on the motion to admit such evidence before trial. 5/ While both H.R. 5406 and the Roth Amendments appear to intend that such a procedure be followed, it is desirable to state this objective more precisely in order to preclude the possibility that trials would have to be interrupted to permit the parties to travel to a foreign country to take the deposition of the custodian or other qualified witness.

- Retain Sections 3491 through 3494 of Title 18, United States Code. The method of certifying and authenticating foreign documents provided by these sections has been

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5/ See Rules 12(d) and 12(e), Federal Rules of Criminal Procedure.

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seldom used since Rule 15 of the Federal Rules of Criminal Procedure was amended in 1974 to permit the taking of depositions in criminal cases at the request of the government. However, it is desirable to retain these provisions since they provide an alternative method of certification in situations in which the custodian or other qualified witness is willing to voluntarily appear for deposition at a United States Embassy or Consulate, thereby relieving the United States of the need to proceed by way of letters rogatory or a request under a mutual assistance treaty in criminal matters.

In addition to facilitating the admissibility of foreign business records in United States criminal proceedings, as both H.R. 5406 and the Roth Amendments seek to do, it is highly desirable for any legislation, designed to enhance the ability of United States law enforcement authorities to investigate and prosecute offenses with respect to which evidence must be obtained from abroad, to remove at least two other obstacles to such investigations and prosecutions.

First, potential problems under the Speedy Trial Act should be eliminated by amending 18 U.S.C. 3161(h) to specifically exclude reasonable periods of delay resulting from efforts to obtain essential evidence from abroad for use at trial. While

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such periods of delay are arguably already excludable under Sections 3161(h)(3) and (8), it is desirable to avoid unnecessary litigation with respect to the scope of those sections by specifically providing for the exclusion of such periods. In this regard, it should be noted that by facilitating the admission of foreign business records by means of a certification, which would be obtained when the records are provided during the investigative or grand jury stage, Congress will be eliminating one of the chief causes of such delays. Therefore, the frequency of use of this proposed provision should be much less than it would be without the proposed foreign business records provision.

Second, potential statute of limitations problems relating to delays in obtaining investigative information and evidence from abroad should be alleviated by permitting the applicable statute of limitations to be extended, on application of the government, for the time needed to obtain such information or evidence, but in no event by more than three years. 6/ Major criminals -- particularly major drug traffickers and fraud violators -- are increasingly taking advantage of the difficulties the United States has in obtaining investigative

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6/ The order granting such an extension of the statute of limitations would be at the discretion of the court supervising the grand jury investigation and would depend on such factors as the nature and circumstances of the investigation and the potential importance of the information sought.

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information and evidence from abroad in attempting to insulate themselves from prosecution in the United States. Extention of the applicable statute of limitations to give the government a better chance to unwind the web of foreign bank accounts and shell corporations used by such criminals to hide their ill-gotten gains and the transactions through which they obtained them, would be an extremely valuable tool to United States law enforcement authorities. 7/

In order to give this Subcommittee a more concrete understanding of the problems faced by United States investigators and prosecutors in pursuing investigations and

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7/ Additionally, we believe any legislation designed to enhance the ability of the United States to obtain evidence from abroad should contain a provision to require persons over whom the United States may assert jurisdiction -- i.e. United States citizens, permanent resident aliens, and defendants in criminal proceedings -- to serve copies on the appropriate United States authority of objections or pleadings filed in a country in which business records sought by the United States are located when such objections or pleadings seek to block United States access to those records.

Such legislation is necessary because in attempting to secure investigative information and evidence from abroad, United States law enforcement authorities are increasingly encountering attempts by targets of investigations and defendants to block United States access to foreign bank accounts and other business records by filing objections to, or seeking injunctions against, disclosure of such records. In some instances, the laws of the country in which such objections are filed, or injunctions sought, do not require that the United States be provided with a copy of the objections or pleadings. Without precise knowledge of the basis upon which the person or entity affected by the request is seeking to block access, it is extremely difficult for United States authorities to supply the necessary information and arguments to the affected foreign authorities to counteract such efforts.

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prosecutions in which major offenders use foreign bank accounts and shell corporations to cover their tracks, I am appending to my testimony a summary of the problems encountered by United States investigators and prosecutors in investigating and ultimately successfully prosecuting a multimillion dollar fraud and kickback scheme perpetrated against Raytheon Corporation by two of its former employees and two principals of a shipping company which had been retained to ship goods produced by Raytheon. This summary dramatizes the importance to United States law enforcement authorities of legislation to better permit them to cope with the rapidly growing problem of transnational criminal activity affecting the United States.

While the legislation I have discussed today cannot alone solve all of the problems we face in obtaining investigative information and evidence from foreign countries, it can greatly help. We are pleased with this Subcommittee's interest in this problem. We stand ready to assist this Subcommittee in any way we can in the drafting and passage of legislation which will permit this country to better deal with the increasing problem of transnational criminal activity affecting it.

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RAYTHEON COMPANY DEFRAUDED

A Classic Multinational Fraud Case

During the investigation and prosecution of a recently concluded commercial bribery case the Department of Justice sought evidence and investigative assistance from four foreign jurisdictions:

Switzerland;
Liechtenstein;
Bermuda; and
the Cayman Islands, B.W.I.

While these requests met with widely varying degrees of cooperation from the foreign authorities, the assistance that ultimately was provided proved crucial to the completion of the investigation and to the successful prosecution of the defendants.

In essence, this case involved a commercial bribery scheme in which the two principals of a shipping company bribed two employees of a customer company to obtain shipping contracts with shipping charges inflated by approximately $2 million. The customer, the victim of this scheme, was the Raytheon Company. The funds from these inflated charges, the scheme proceeds, first were diverted to a Swiss bank account nominally held by a Liberian shell corporation. In fact, the Liberian corporation was controlled by the shipping company principals through a Swiss attorney in Geneva. The diversion of the funds to the Swiss account thus enabled the defendants to conceal and disguise the existence and subsequent distribution of the scheme proceeds.

The defendants caused approximately $1 million of the scheme proceeds to be transferred by means of checks to another Swiss account held in the name of a Liechtenstein entity and to two bank accounts in the Cayman Islands. This Liechtenstein entity was controlled by the two recipients of the bribes through a Geneva attorney and a Liechtenstein attorney. The Cayman Islands bank accounts were held by two Cayman Islands companies, each of which was controlled by the bribe recipients.

The bribers' share of the proceeds, approximately $1 million, was transferred to another Swiss account held by a Liechtenstein entity that they controlled and then, by wire transfers, to a Bermuda bank account in the name of a Cayman Islands company they owned. At least some of the these funds were then "laundered" by means of sham loan arrangements involving a Netherlands bank; in these loan arrangements the funds were used to secure loans to the defendants.

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A. Switzerland

The Swiss Treaty request filed under the United States-Swiss Treaty on Mutual Assistance in Criminal Matters was the most complex and time-consuming for the Department of Justice prosecutors. In all, nearly three years were spent in pressing this request before all of the essential items of evidence were obtained.

The formal request, which asked chiefly for bank account records, was filed with the Swiss Central Authority in September of 1978. On November 3, 1978, the targets of the investigation caused an "opposition" to be filed with the Swiss authorities in which objections were raised to the execution of our request. Thereafter, we filed both a response to the opposition brief as well as a supplemental request, which asked that a Swiss lawyer, whom we had just identified, be deposed about his activities in the fraud scheme.

The Swiss Central Authority consolidated the original and supplemental requests and on April 10, 1979, rejected the oppositions filed against each of our requests. Pursuant to the Swiss implementing legislation, the opposing parties were granted thirty days in which to appeal the decision to the Swiss Federal Court and during this period appeals were filed. On August 8 the Swiss Federal Court began its deliberations on this matter and on September 28 it rejected the appeals; however, the implementing legislation provided for appeal to a special "consultative" commission and the opposing parties were granted leave to file their appeal briefs.

The president of the consultative commission set the meeting of the commission for July 9, after which the appeals were rejected by a commission decree of August 26; the opposing parties then filed an administrative appeal with the Swiss Federal Council, a body somewhat akin to our federal Cabinet.

The Federal Council formally rejected the appeals on February 11, 1981, and on February 17 the Swiss Central Authority dispatched documents and testimony gathered pursuant to our request. Many of these documents had been redacted to remove the names of certain allegedly uninvolved third parties.

In early May 1981 the Swiss Central Authority issued decrees denying the objections of three "uninvolved" parties to disclosure of their identities in certain of the bank account documents. The parties thereafter filed appeals with the Swiss Federal Court. In mid June the objection of a fourth party was denied; this decision likewise was subsequently appealed to the Federal Court. In the meantime, during mid May, the Department of Justice prosecutors attended the re-examination of the Swiss lawyer in Geneva. Although this deposition was much more fruitful, principally because the prosecutors were there to press the questioning, the Swiss lawyer refused to answer several crucial questions on grounds of attorney-client privilege.

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Upon their return to the United States the prosecutors, acting through the U.S. Central Authority, the Office of International Affairs in the Department of Justice's Criminal Division, requested the Swiss Central Authority to cause the attorney-client assertion to be adjudicated and to compel the lawyer to answer the questions or face contempt. This request was relayed to the examining magistrate.

Near the end of July 1981 the Department of Justice prosecutors were faced with a serious problem. The statute of limitations would run in late September on the first, and perhaps strongest, counts of the proposed indictment. The appeals of the four "uninvolved" parties were still pending before the Swiss Federal Court and there had been no adjudication of the attorney-client claim.

Thus in late August the prosecutors and a member of the U.S. Central Authority returned to Switzerland for the additional depositions. As had been hoped, just as the depositions got underway the Federal Court issued its decrees rejecting the appeals of the four opposing parties. Thereupon the Swiss Central Authority identified each of the parties and handed over unredacted copies of documents relating to them. In addition, we also obtained original checks from the primary bank account.1/ Because the appeals were rejected at the early stages of the depositions, we were permitted to include in our questions references to the previously unidentified parties and thereby obtain significant evidence as to their complicity in the scheme and the ultimate disposition of the scheme proceeds. Although the Swiss lawyer continued to assert the attorney-client privilege, the Department of Justice prosecutors were successful in extracting from him, under intense questioning, much of the information that he was trying to shield.

The evidence obtained during this trip was presented to a federal grand jury in early September and an indictment was returned on September 10, 1981, approximately ten days before the statute of limitations was to run out on the first counts. Although we pressed the Swiss authorities to adjudicate the validity of the Swiss lawyer's assertion of the attorney-client privilege, there was never any adjudication of this issue. Thus the targets of the investigation succeeded in preserving their anonymity in the scheme transactions carried out by their Swiss lawyer and, as a consequence, the Department of Justice prosecutors were compelled to rely soley on circumstantial evidence to implicate the defendants in the Swiss transactions.

After the indictment of this case, depositions of the Swiss witnesses were taken in Switzerland for use at trial. Again, however, the Swiss lawyer refused to answer certain key questions on grounds of attorney-client privilege and again we were unable to obtain an adjudication of this issue by the Swiss judicial authorities.

1/ Fingerprint analysis identified a defendant's fingerprint on one of the checks obtained from the Swiss bank account.

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B. Liechtenstein

After indictment, and at the government's request, a letters rogatory application was issued to the judicial authorities of Liechtenstein by the U.S. District Court for the District of Columbia, the Honorable Norma Holloway Johnson presiding. Shortly after the application was filed, a Liechtenstein court granted the requested assistance and during August 1982 the Liechtenstein witnesses were deposed in Vaduz, Liechtenstein. This testimony and related documentary evidence produced at the time of the depositions were introduced at trial by the government.

C. Bermuda

As British Colonies, both Bermuda and the Cayman Islands follow the general British practice of denying requests for investigative assistance in the pre-indictment stage of a case. Once the indictment was returned, however, our letters rogatory request for Bermuda was issued by our trial court. The attorney general of Bermuda received the letters rogatory papers and filed these with the court in Bermuda, which quickly granted the requested assistance. The subsequent deposition proceeding produced significant testimony and documentary evidence that was used at trial.

D. Cayman Islands

Our post-indictment experience with the Caymanian authorities was in marked contrast to the assistance rendered in Bermuda. Shortly after the indictment was returned, we learned that a businessman from the Cayman Islands, who had been associated with the defendants, was visiting in the United States. This individual was served with a subpoena and within a short time his U.S. counsel advised us that he would comply with the subpoena. At the same time, counsel requested that the we assist the witness in obtaining from the Cayman Islands Grand Court a release from the provisions of the Cayman Island business and professional secrecy act. We agreed to do so provided the application for release did not produce unreasonable delay. In early October 1981 the case prosecutors met with the attorney general of the Cayman Islands and provided him and his associates a comprehensive three hour briefing on the case. After the briefing, the attorney general indicated that he was satisfied that we had a prima facie fraud case and that, as amicus to the Grand Court, he would advise the court that he had no objections to the witness' testifying in the United States. On the next day, the Grand Court issued an order permitting the witness to testify. Subsequently, the witness appeared in the United States and testified.

Based on this positive precedent and with the approval of the Caymanian authorities, we filed with the Cayman Islands government a formal request under their business secrecy law. In the request we asked for assistance in obtaining bank records,

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local company records and testimony of witnesses in the Cayman Islands. The request was approved by the appropriate officials and by the executive committee of the legislature, which authorized the police to gather the requested evidence. At this point, however, complications developed. The banks refused to produce any documents unless compelled to by court order. The attorney general notified us that he could seek such orders only if we filed letters rogatory.

We immediately prepared and submitted to the trial court a letters rogatory request, which was promptly issued by Judge Johnson. Unfortunately, the Cayman Islands attorney general indicated that his office, for various reasons, could not assist in filing the request with the Grand Court. Instead, he advised that we would be required to retain local counsel to represent the United States in this matter.

Eventually we retained both local Cayman counsel and another attorney whose practice involved extensive litigation in the courts of several Caribbean countries including the Cayman Islands. Through our retained counsel we then filed the letters rogatory application. After several hearings the Cayman Grand Court denied, in substance, the request for judicial assistance. On the advice of our private counsel we appealed this decision to the Cayman Court of Appeal.

After lengthy hearings in which the Cayman government argued in opposition to our request, the appeals court, in a landmark decision, granted the letters rogatory application, piercing for the first time Cayman bank secrecy. Thereafter, in July 1982, the Cayman bank officers and business agents named in the request appeared at deposition proceedings in Grand Cayman, produced documents including bank account records, and were deposed. The Cayman evidence thus obtained established a vital link in the chain of proof required for this prosecution.

Observations and Conclusions

This prosecution is noteworthy in several respects. First, the Department's success in obtaining an order from the Cayman Court of Appeal, piercing Cayman bank secrecy for the first time in a foreign prosecution, establishes a valuable precedent for future requests to the Cayman courts for assistance in other United States prosecutions. The Cayman Court of Appeal order also marks the first time that videotaping of depositions has been authorized in the Cayman Islands.

This case also highlighted a potentially serious problem regarding the United States-Swiss Mutual Assistance Treaty. The Swiss Treaty request filed in this case was the first such request to have been litigated through every level of appeal provided in the Swiss domestic implementing legislation. This lengthy appeals process consumed almost two and one-half years and very nearly extended the investigation past the applicable statute of limitations.

Particularly well illustratated in this case are the benefits enjoyed by defendants who employ foreign bank secrecy jurisdictions and other "offshore" transactions in their schemes:

1) Evidence concerning foreign transactions is difficult to obtain in admissible form;

2) Obtaining foreign evidence is time consuming; and

3) Obtaining foreign evidence is an expensive process.

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Mr. CONYERS. Our final witness is from the Internal Revenue Service, those who are in charge of criminal investigations, Mr. John M. Rankin and his associates, familiar with the misuse of foreign countries for tax evasions and other illegal activities. So we welcome you today and we would like to hear your views on the proposed legislation.

TESTIMONY OF JOHN M. RANKIN, ACTING ASSISTANT COMMISSIONER, CRIMINAL INVESTIGATION, INTERNAL REVENUE SERVICE, ACCOMPANIED BY JOHN W. JENNINGS

Mr. RANKIN. Thank you, Mr. Chairman, Congressman Gekas. I do have a short statement that has been passed out that I would like to refer to for the record, and after referring to that I will be pleased to answer any questions that either of you might have.

I am pleased to be here with you today to discuss the operational problems caused for the IRS by the inadmissibility of business records kept in foreign nations as evidence in the courts of the United States. We appreciate the opportunity to comment on this important topic and to share with you our insights on the nature of the problem.

To a large exent, the nature of the problem the service has in this area relates to the use of offshore tax havens by United States taxpayers to evade taxes. We have various projects under way to identify taxpaying entities who are using havens in this way.

While at this point we cannot say with any real precision how much in taxes is being lost through these devices, we do feel confident in saying it is in the many billions of dollars annually.

Although we have realized some success in identifying these entities and are expecting more success in the future, the successful prosecution of these tax evaders is dependent on obtaining admissible evidence from foreign countries. Our interest in your efforts is clear.

While I am certain the members of this subcommittee are familiar with offshore tax havens I would like to take a moment to briefly define the term for the benefit of anyone here who may be new to this area.

"Tax havens" have been loosely defined to include countries having a low or zero rate of tax on all or certain categories of income, and offering a certain level of banking or commercial secrecy. Most tax havens also possess modern communications systems, a general lack of currency controls, an aggressive policy of self promotion, and no extensive involvement in tax treaties.

Applied too literally, this general definition could cover many nations that are not actual tax havens and exclude others that are. For instance, some tax havens do have tax treaties with us. However, I am sure anyone familiar with the subject "knows one when he sees one," regardless of the exact definition used.

Over time those nations seeking recognition as "tax havens" have generally been successful in attracting the attention they sought.

From our perspective, the real victims in this widespread evasion are the honest taxpayers who have to pay their fair share of the

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tax burden while a few unscrupulous individuals evade their responsibilities.

This situation is decidedly unhealthy for our self-assessment system of taxation and primarily because to a considerable degree the activities in these tax havens involve narcotics trafficking and other elements of organized crime, illegal tax protesters, and promoters of abusive tax shelters, it is equally unhealthy for the economic and social structure of our country as a whole.

Of equal concern is the growing number of seemingly law-abiding persons of moderate means who are using offshore banking facilities and other offshore entities as a means of tax evasion. We believe many such people are learning of these tax havens through the efforts of unscrupulous individuals who are marketing tax shelter schemes using offshore banking facilities, as well as other connections.

There is a known trend toward "brokering banks"; that is, for a price you can create or buy a bank for the express purpose of evading tax liability.

The Internal Revenue Code, as well as other portions of the United States Code, make it a felony for anyone to willfully evade a tax imposed by the U.S. Government, or to interfere with the lawful functions of the Treasury Department in collecting income taxes.

In enforcing these laws in an international setting the Internal Revenue Service encounters numerous operational, legal, and diplomatic problems. By far the most pressing problem, however, is accessibility to information, or rather a lack of accessibility.

The problem here is not so much one of substantive tax law, but of how to get the information to enforce it. The secrecy provisions of offshore tax havens create a veil which we often have great difficulty penetrating in an effective manner.

Although we cannot readily quantify the extent of the problem that we have with the admissibility of evidence from foreign countries in U.S. courts, we know that the problem does exist. In fact, our inability to quantify the problem may be evidence that the problem does exist.

One current trend we see in tax evasion schemes is to channel money through foreign countries to conceal its origin and the identity of its owner.

With this trend growing, the problem of evidence from foreign countries not being admissible in U.S. courts will continue to grow. For example, between 1977 and 1982 IRS Criminal Investigation identified 707 cases which had financial transactions involving some 90 foreign countries.

Our analysis of these cases shows:

That 374 cases (53 percent) showed unreported income from legal sources, including 98 cases involving tax shelters and 35 cases involving tax protesters, and 333 cases (47 percent) showed income from illegal sources (including narcotics trafficking, money laundering, embezzling, pornography, gambling, et cetera);

The total estimated unreported income from these 707 cases is over $2.6 billion.

That 508 cases (72 percent) included at least one tax haven country;

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The Bahamas, the Cayman Islands, the Netherlands Antilles, Panama, and Switzerland showed up in 76 percent of the instances where tax haven countries were involved;

That 121 cases (17 percent) were discontinued or declined, in 57 instances because records from foreign countries were not available or the evidence was not admissible in U.S. courts; of these 57 instances, 48 involved tax haven countries.

While we do have avenues to pursue in obtaining admissible evidence for criminal trials, (i.e., tax and mutual assistance treaties), these are not universal for all countries, are frequently time consuming, and often are not as productive as we would like.

In addition, for tax administration purposes there is another problem. Foreign countries are generally agreeable to enter into mutual assistance treaties; however, tax haven countries which derive a good part of their income from providing bank and commercial secrecy generally decline to extend their cooperation in criminal tax matters.

We need a better way to obtain admissible evidence from foreign countries, and we welcome your interest in this area as a positive and constructive development.

I will be pleased to answer any questions you or the members may have.

Mr. CONYERS. Thank you very much, Mr. Rankin. We appreciate your support in our attempts to improve the criminal law in this respect.

I was just wondering about the Netherland Antilles. We have been working on this particular tax haven in connection with the Government Operations Committee and it raises the question, it seems, that they alone do not have a more updated treaty. But apparently having a tax treaty does not change too much, anyway.

Can you explain that?

Mr. RANKIN. It depends on what the treaty consists of, what the conditions are. Of course, the treaty with the Netherlands Antilles is currently under negotiation. The tax treaties do not abrogate the commercial and bank secrecy laws of a particular country, so it all depends on what the bank secrecy and commercial secrecy laws of the country are as to whether or not we can get the information even though we may have the tax treaty with that country.

Most of the mutual assistance treaties or some of the mutual assistance treaties do not provide for information to be provided strictly for criminal income tax cases for the reason I stated at the conclusion of my statement.

Mr. CONYERS. Thank you very much.

Mr. Gekas?

Mr. GEKAS. Thank you, Mr. Chairman.

I, too, would just like to touch a little more on what the chairman has opened here. In the mutual assistance treaties, for instance, that exist between Switzerland and the United States you do not touch upon the secrecy provisions of the Swiss law; is that correct? Or could?

Mr. RANKIN. Could.

Mr. GEKAS. It could be mutual assistance in every area except revelation of things that Switzerland for its one purpose wants to provide secrecy for; is that correct?

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I am just wondering in what areas there is assistance.

Mr. RANKIN. We receive assistance, Congressman Gekas, particularly in the instances where there is a violation of Swiss law, there is a violation of law that involves a Swiss citizen or there is a violation of our law that would be a violation of Swiss law.

For instance, on narcotics traffickers, that sort of situation, we have been in some instances able to obtain information through the Department of Justice auspices from the Swiss. So we have been able to get some informtion.

If it is purely a criminal income tax case without an accompanying illegal income source then we have some difficulties. And even with that assistance we face the problem that Mr. Richard proposed a while ago. That was that even though you may get the information during the investigative stage, you have to again go through the process of getting it in admissible form for the trial later.

Mr. GEKAS. Are we having any luck since we were able to get Al Capone on income tax evasion with these racketeers in narcotics and other international illegal trade tips of things? Have we had any success in nailing them for income tax evasion when other laws have failed?

Mr. RANKIN. We sure have, Congressman. We are participating very heavily in the present organized crime drug enforcement task forces across the country and have had much success and I think the IRS is recognized by the Department of Justice and most U.S. attorneys as a principal contributor in terms of working investigations, financial investigations as a part of the overall effort against narcotics traffickers.

So we have continued to have success down through the years against organized crime figures in general.

Mr. GEKAS. I lost $3 last week in a gin rummy game. I am wondering if I can credit that against any future wins and not be subject to IRS scrutiny.

Mr. RANKIN. I think the law is that you can credit your losses against the wins.

Mr. GEKAS. Thank you. I have no further questions.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you.

[The prepared statement of Mr. Rankin follows:]

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STATEMENT OF JOHN M. RANKIN, ACTING ASSISTANT COMMISSIONER (CRIMINAL INVESTIGATION), INTERNAL REVENUE SERVICE

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To a large extent, the nature of the problem the Service has in this area relates to the use of offshore tax havens by United States taxpayers to evade taxes. We have various projects underway to identify taxpaying entities who are using havens in this way. While at this point we cannot say with any real precision how much in taxes is being lost through these devices, we do feel confident in saying it's in the many billion of dollars annually. Although we have realized some success in identifying these entities and are expecting more success in the future, the successful prosecution of these tax evaders is dependent on obtaining admissible evidence from foreign countries. Our interest in your efforts is clear.

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From our perspective, the real victims in this widespread evasion are the honest taxpayers who have to pay their fair share of the tax burden while a few unscrupulous individuals evade their responsibilities. This situation is decidedly unhealthy for our self-assessment system of taxation and -- because to a considerable degree the activities in these tax havens involve narcotics traffickers and other elements of organized crime,

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- 374 cases (53%) showed income from legal sources (including 98 cases involving tax shelters and 35 cases involving illegal tax protesters); and 333 cases (47%) showed income from illegal sources (including narcotic trafficking, money laundering, embezzling, pornography, gambling, etc.);
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While we do have avenues to pursue in obtaining admissible evidence for criminal trials (i.e., tax and mutual assistance treaties), these are not universal for all countries, are frequently time consuming, and often are not as productive as we would like. In addition, for tax administration purposes there is another problem. Foreign countries are generally agreeable to enter into mutual assistance treaties; however, tax haven countries which derive a good part of their income from providing bank and commercial secrecy generally decline to extend their cooperation in criminal tax matters. We need a better way to obtain admissible evidence from foreign countries, and we welcome your interest in this area as a positive and constructive development.

I will be pleased to answer any questions you or the members may have.

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Mr. CONYERS. We have been joined by Mr. McCollum, and we welcome our subcommittee member at this time.

Mr. MCCOLLUM. I have no questions at this time, Mr. Chairman.

Mr. CONYERS. We are grateful, Mr. Rankin. We note you are accompanied by Mr. John W. Jennings, and thank you very much for your testimony.

The subcommittee stands adjourned.

[Whereupon, at 11:15 a.m. the subcommittee was adjourned.]

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